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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 494

SWAYNE & HOYT, LTD. (Gulf Pacific Line), GULF PACIFIC MAIL LINE, LTD., and LUCKENBACH GULF STEAMSHIP COMPANY, INC., *Appellants*,

vs.

THE UNITED STATES OF AMERICA.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

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I.

Opinion Below

The opinion of the District Court of the United States for the District of Columbia was filed on June 29, 1936. (Record, pages 35-42.) It has not been reported.

II.

Jurisdiction

A statement as to the jurisdiction of the Supreme Court of the United States was duly filed pursuant to Rule 12 and, on November 23, 1936, probable jurisdiction was noted by the Court.

III.

Statement of the Case

This is a proceeding to review and set aside an order (R. 34) of the Secretary of Commerce seeking to abolish a certain contract rate system which for many years previously had been employed by appellants in their shipping business. A hearing was held on April 6 and 7, 1936, before a special statutory court of three judges constituted for that purpose in accordance with the provisions of the District Court Jurisdiction Act (U.S.C., Title 28, §47) and of the Shipping Act, 1916 (U.S.C., Title 46, §830). That court entered its decree (R. 47) on July 15, 1936, dismissing the bill of complaint.

The appellants are common carriers by water engaged in intercoastal commerce between United States ports on the Gulf of Mexico and ports on the Pacific Coast via the Panama Canal. They constitute the membership of the Gulf Intercoastal Conference and operate under an agreement (R. 80) which has been duly approved by the United States Shipping Board Bureau, Department of Commerce, pursuant to the provisions of Section 15 of the Shipping Act, 1916 (39 Stat. 733, U.S.C., Title 46, §814).*

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* Section 15 of the Shipping Act, 1916, provides:

"That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; alloting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.

"The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in

As members of the Gulf Intercoastal Conference, the appellants, almost continuously from October, 1927, to October, 1935, maintained the contract rate system here involved. (R. 61, 63-64.) For several years after the first shipping service was commenced from the Gulf to the Pacific via the Panama Canal the trade was disrupted by rate-cutting practices and resultant rate wars which not only seriously affected the revenues of the steamship lines but also brought about very unstable conditions for shippers, who could not determine in advance what their own or their competitors' freight rates would be. At the request of various shippers, and after serious consideration by the water carriers as to what should be done to effect a stabilized condition as to service and rates, the contract rate system was inaugurated. (R. 20-21, 31, 61, 76.) The first appearance of contract rates was in connection with Westbound Contract List No. 1 issued at Gulfport, Mississippi, in October, 1927. (R. 63-64.) The system remained in effect until October, 1935, except for a short period from July, 1928, to February, 1929, when the Gulf Conference was disbanded. The operation of the system proved a very material factor in stabilizing conditions both as to service and rates. (R. 61.) During a very disastrous rate war

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violation of this Act, and shall approve all other agreements, modifications, or cancellations.

"Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

"All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

"Every agreement, modification, or cancellation lawful under this section shall be excepted from the provision of the Act approved July second, eighteen hundred and ninety, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' and amendments and acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,' and amendments and acts supplementary thereto.

"Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action."

which took place in the North Atlantic service during 1931 and resulted in extremely chaotic conditions, the Gulf Conference remained intact and generally upheld the Gulf rate structure. Without the contract system there is a great possibility that the Conference lines would find themselves unable to continue to render the same service, thus resulting in materially reduced operations. (R. 64.)

The form of contract (R. 77-80) employed is merely an agreement between the appellants, as members of the Gulf Intercoastal Conference, and the shipper whereby the latter, during the term of the contract (usually six months, all contracts expiring at the same time) agrees to ship by steamers of the Conference lines all of the water-borne shipments which the shipper shall make *of the commodity indicated* from Gulf ports to Pacific Coast ports, such shipments being *estimated at a given number of carloads.* The carriers agree to transport all of the said shipments, provided space is available when application is made therefor, at the rates named in the contract as modified by the tariff which is filed with the Shipping Board Bureau and is subject to approval, disapproval, and regulation by the Bureau. *The tonnage estimates given in the contracts enable the carriers to arrange their operations accordingly* (R. 67). It is provided that, if the shipper shall violate the agreement, the higher rate set forth in the tariff shall be payable upon all shipments made within the contract period. A differential of ten cents per hundred between the contract and non-contract rate was determined by the appellants to be equitable and is the one applied (R. 65).

Contract rates do not apply to all commodities, but, in general, apply only to those which move in large volume and with regularity. (R. 64.) However, there are some articles, such as bulk sulphur, bulk corn, soil pipe, agricultural implements, and hardwood lumber, that move in heavy volume but are not contractable. (R. 75.) Corn was at one time on the contract list, but it was removed at the request of shippers of that commodity. (R. 64.) The Conference members select the commodities which are to be contract-

able, but often shippers request that certain commodities be placed upon the contract list. (R. 64.) The change of a commodity from non-contractable to contractable does not necessarily mean a ten-cent reduction. If the item be made contractable, the rate then applicable may become the contract rate, in which case the non-contract rate would be ten cents higher. (R. 67.) The tariff filed by appellants to become effective October 3, 1935, contained 1137 items, and *only 382 of these were contractable.* (R. 56.)

The contract system does not apply at all to eastbound traffic, but only westbound—from the Gulf to the Pacific. This is because conditions in the trade are such that contracts are not needed to stabilize the service and the rates eastbound. (R. 62.) The system likewise applies only on traffic moving port-to-port, although some of the traffic from the Gulf moves under joint all-water rates with the barge lines, some under rail-ocean rates with the railroads, and some under rail-barge-ocean rates, in addition to port-to-port movements (R. 74). From January 1 to July 1, 1935, 63.7% of all tonnage carried by appellants westbound moved under contract. During this same period less than 1% of the contractable tonnage moved at non-contract rates. (R. 60.)

The contract system only places a deterrent upon shipments via steamers that do not operate regularly in the Gulf intercoastal trade and have no interest therein except for such revenue as they may obtain from it. This is done, as above indicated, by providing that the Conference lines shall charge a contract shipper the higher (non-contract) rate upon his contract commodities if he has violated his contract and shipped items named therein by other lines westbound from Gulf ports.

Contracts are available to *all* shippers who care to sign. (R. 65, 67.) A shipper has the privilege of executing a contract on only one contractable item or on as many in the tariff as he sees fit. (R. 62.) It is entirely up to the *shipper* to decide whether he will pay a non-contract rate or a contract rate.

The contract shipper has the choice of all lines in t
Gulf Conference. (R. 57.) At the present time those lin
are three in number, being the appellants herein. Sway
& Hoyt, Ltd., operate the Gulf Pacific Line and manage t
Gulf Pacific Mail Line, Ltd. The latter comes into the Gu
eastbound on its own behalf and then its vessels serve t
out-ports of the Gulf westbound for the Gulf Pacific Line
that the westbound service is, with slight exception, serv
by only two lines, namely, Luckenbach Gulf Steamship Co
pany and the Gulf Pacific Line. (R. 63.)

There are no carriers operating regularly in the gener
cargo trade from the Gulf to the Pacific that are not me
bers of the Gulf Intercoastal Conference. The Conference
limited to lines engaged in the Gulf intercoastal trade, b
any such line may become a member of the Conferen
(See Par. 6* of Conference Agreement, R. 83.) The matt
of ultimate inclusion in or exclusion from the Conference
one of detailed regulation by the Bureau.

In this connection it must be remembered that any oth
group of water carriers may, if it sees fit, establish a co
ference in the Gulf entirely apart from the Gulf Intercoast
Conference. The only limitations are those imposed
Section 15 of the Shipping Act, and by regulations of t
Secretary of Commerce. In other words, the way is op
to all to enter into a cooperative arrangement by agreeme
approved by the Secretary just as it was to the appellan
herein. Obviously, the majority of the tonnage moves ov
appellants' lines, inasmuch as they offer the only regul
service between the Gulf and the Pacific, and more th
one-half of this tonnage moves under contract. Howeve
it should be noted that of 1137 items in the westbou

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* Par. 6 provides that "Any person, firm or corporation engaged in sa
intercoastal trade may hereafter become a party to this agreement by t
consent of a majority of the parties hereto by affixing his, their or its sig
ture hereto. Such admission for membership in this Conference,
official application, shall not be denied to any party except for just a
reasonable cause; further, no such admission to membership is to
effected until modification recording same has been filed with and approv
by the United States Department of Commerce. . . ." (R. 83.)

tariffs filed by appellants, only 382, or approximately one-third of the total, are contract items. None of the others are subject to contract rates, and they are in the same position as though there were no Gulf Intercoastal Conference Agreement or contract rate system.

Any steamship company that knows intercoastal trade can enter the Gulf service if it cares to do so, but it would not be easy to operate successfully because the service is now adequately tonnaged. (R. 65.) As a matter of fact, the Gulf Pacific Line, at the time of the hearing, was operating only six steamers in the Gulf intercoastal trade, and the Gulf Pacific Mail Line, Ltd., was operating three. Those lines had had three or four steamers tied up for the preceding two or three years and were anxious to take at least one of them back to the Pacific Coast, but had been unable to secure sufficient excess cargo for that purpose. Luckenbach Gulf Steamship Company was then operating six steamers in that trade. (R. 74.)

The contract rate system would be only a minor obstacle to the successful operation of a new line in the Gulf intercoastal trade. However, the additional line would take enough tonnage from the present Conference members to make the result felt very seriously in their revenues, probably to the extent of reducing their services. If such a line offered a service comparable to that of the Conference lines, and at lower rates, the new line would have very little difficulty in keeping its ships filled in both directions, but it is questionable as to whether or not it could operate successfully at such rates. This is because the bulk of the cargo moving through the Gulf is low grade and can only support a low level of rates. (R. 65-66.) In fact, a witness who opposed the contract rate system would not state that successful operation would be possible by another line from the Gulf *even though there were no contract rate system*, and he admitted that it would not be in the public interest to have five or six lines operating from the Gulf to the Pacific. (R. 68.) The lower court observed in its opinion

that *"the available traffic from Gulf ports will not support another line."* (R. 39).

Only one other line, namely, the Nelson Steamship Company, has sought membership in the Gulf Intercoastal Conference. That Company first applied for membership in March, 1934, but its application was denied. At that time it had filed no tariffs and had no service in effect in the Gulf. (R. 68, 69.) Obviously, it was not engaged in the intercoastal trade as required by the Conference Agreement. Two months later it again applied and was again denied. It then filed a petition with the Shipping Board Bureau asking that the approval of the Conference Agreement be withdrawn. The petition was denied. (R. 68-69.) The Company had a fleet of 12 vessels, only six or seven of which were being operated. (R. 69-70.) According to its Vice President, the Company would have used a number of its idle steamers in the Gulf trade if it had not been for the contract rate system. (R. 68.) It even considered the possibility of entering the Gulf at the expiration of appellants' existing contracts, but decided that it would have only a "50-50 chance" of success. (R. 69.) It anticipated that there would be a marked development of business for the Pacific Coast by the way of the Gulf and it wanted to be in a position to participate in that business when it developed. The Company also expected to develop new business by taking tonnage away from the North Atlantic lines. (R. 69.)

The practical issue in connection with the contract rate system is between a regular service with stabilized rates and a service which is subject to frequent interruption by reason of the entry of one-way tramp steamers or distress* tonnage of one kind or another. Distress tonnage represents an actual danger that has confronted the Conference lines since the enactment of the Intercoastal

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*An example of "distress tonnage" is where an owner charters a ship eastbound from the Pacific Coast to some one, who does not operate regularly, to carry a full cargo into the Gulf, and the owner or charterer is willing to take any cargo for the return trip that he can secure *at cut rates* (R. 66).

Shipping Act, 1933.* (R. 66-67.) An illustration is the so-called Girdwood case where three steamers, two of them idle vessels chartered by the Nelson Company to Girdwood, were allowed to load and sail after the Girdwood Company had temporarily filed a tariff with the Bureau materially reducing the rates from the Gulf to the Pacific. The Company owned no steamers, had no soliciting forces to speak of, and, in fact, had nothing except a sub-charter of the vessels. (R. 67, 69.) Thereafter, regular tariff schedules from the Gulf to the Pacific were filed but were protested. Pursuant to a hearing, wherein it appeared that Girdwood owned no vessels and had none under charter, and did not own, control or lease any terminal facilities, the Secretary of Commerce found that the Company was not a common carrier by water and so ordered the tariffs stricken from the files. See *Schedules of Girdwood Shipping Company*, 1 U. S. S. B. B. 306, decided March 15, 1934.

During the eight years that the contract rate system has been employed by appellants there has never been a formal complaint against the practice. (R. 62.) On the contrary, the record shows that the shippers overwhelmingly approve the system. In fact, this is admitted by the appellee in Exhibit B attached to its answer (R. 31):

> "The record shows that generally shippers who heretofore have executed rate contracts with respondents are satisfied with the contract rate system and urge its continuance. Only one of such shippers, and representatives of Sudden & Christenson (Arrow Line)

* The appellee has always insisted that any need which may have previously existed for the contract rate system was eliminated by the Intercoastal Shipping Act, 1933 (47 Stat. 1425, U.S.C., Title 46, § 844), which enlarged the powers of the Shipping Board. As observed in the opinion of the lower court (R. 36-37): "The new Act required every carrier to file with the Shipping Board and keep open to the public its actual schedule of rates, fares, etc.; and forbade any change in the rates, fares, etc., except by publishing and filing a new schedule not effective, without the approval of the Board, earlier than thirty days after filing; and gave the Board power to suspend the effectiveness of the new schedule pending a hearing. Under the 1916 Act carriers were required to file only their maximum rate. Under the 1933 Act they are required to file their actual rate, and the actual rate so filed may not be changed without giving thirty days' notice."

and Nelson Steamship Company, common carriers by water engaged in intercoastal transportation between Atlantic and Pacific coasts, testified against the proposed rates and rule."

The objecting shipper to whom reference is made had formerly held a contract with appellants but had failed to renew it and so was called upon, pursuant to an affirmative ruling by the Shipping Board, to pay the non-contract rate. He subsequently entered into contracts with appellants. He opposed the system not because contract shippers did not receive any special physical service, but because he found it "annoying and troublesome, as well as unnecessary." Furthermore, he was not particularly interested in regularity of service—one of the two aims of the contract system. (R. 60.)

There were introduced in evidence 218 letters from as many different shippers, 215 of which advocated the continuance of the contract rate system and three of which advocated its discontinuance. (R. 71.) More than 37% of the contractable tonnage handled by the appellants was furnished by 191 of the shippers who wrote in favor of the system. (R. 62.) If there were to be added to that the contractable tonnage furnished by the United States Pipe & Foundry Company and the American Cast Iron Pipe Company, each of which advocated (R. 56, 57) the continuance of the system, the total would represent 55.4% of the contractable tonnage. (R. 62.) Excerpts from several of the letters are set forth in the record. (R. 71-73.) Two of the three shippers who wrote in opposition to the retention of the contract system furnish only very small amounts of cargo from the Gulf, and the third was from the aforementioned shipper who had violated his contract and appeared personally to testify against the appellants. (R. 62.)

Several shippers testified that the contract rate system had been satisfactory because it guaranteed them against increases in rates on comparatively long term contracts,

and that this stability of rates afforded by the contract system was necessary especially where prices must be supplied months in advance, and where bids must be submitted weeks before the business actually materializes. (R. 56-57, 58-59, 61.) One witness testified that his company, a large shipper (approximately 120,000 tons annually) of cast iron pipe from the Alabama manufacturing territory, had had experience with all types of steamship service, both tramps and regular lines; that the service and rates never became well established until 1924 or 1925, when two reliable lines entered the Gulf intercoastal service, signed contracts with the company and protected it with a maximum rate; that this practice grew into the contract rate system; and that it has proved entirely satisfactory, and a protection which his company does not want to see eliminated. (R. 75-76.)

On June 10, 1933, the President issued an executive order numbered 6166 (U.S.C., Title 5, § 132, note), presumed to be pursuant to the Executive Department Reorganization Act of June 30, 1932, as amended March 3, 1933 (47 Stat. 1517, U.S.C., Title 5, §126), whereby he abolished, as of August 10, 1933, the United States Shipping Board and transferred its functions to the Department of Commerce. Ever since, the functions of the Shipping Board have been administered by the Department of Commerce under the direction of the Secretary.

The tariff schedule which was filed by appellants to be effective on October 3, 1935, embraced the contract rate system in a rule (#53, R. 53) providing that shippers who did not sign contracts would be charged ten cents more per hundred pounds than the contract rates. The Secretary of Commerce suspended the rule and ordered an investigation into the question of the contract system. This was known as Docket No. 294 and was the second investigation embracing this subject, the first being Docket No. 126—"Intercoastal Investigation, 1935," that resulted in an order abolishing the system, which order was later vacated. Pursuant

to the second investigation the Secretary entered an order (R. 34) on January 21, 1936, commanding appellants to cancel their contract rate schedules on or before February 3, 1936. The effective date was thereafter postponed several times, finally to June 1, 1937, to permit a judicial determination of the question.

This suit was filed on March 4, 1936, praying (R. 9) that the order of the Secretary be adjudged unlawful and void, and that it be "set aside, suspended, cancelled and rescinded, and the enforcement thereof perpetually enjoined".

IV.

Question Presented

The primary question presented is whether appellants' contract rate system is unduly or unreasonably preferential or prejudicial by virtue of the fact that it offers to contracting shippers a lower rate covering certain commodities, when moving entirely port to port from the Gulf to the Pacific, in exchange for the agreement of such shippers to ship all such commodities, estimated in the contract as to total tonnage, during the period of the contract, in vessels operated by the water carriers regularly engaged in the Gulf intercoastal trade and operating under a Conference Agreement duly approved by the Secretary of Commerce, where it is shown (1) that such patronage is necessary in order to insure regularity and stability of service and to further the purpose of the Shipping Act, and (2) that there is not sufficient tonnage available to support an additional water carrier.

V.

Specification of Errors

The District Court of the United States for the District of Columbia erred—

1. In refusing the injunction prayed for and in dismissing the Bill of Complaint.

2. In finding that the order appealed from is supported by substantial evidence and is lawful and valid.

3. In finding that the contract rate system results in any undue or unreasonable preference or advantage.

4. In finding that the contract rate system results in any undue or unreasonable prejudice or disadvantage.

5. In finding that the charging of a higher rate under the contract rate system is, in effect, a penalty.

6. In finding that the contract rate system creates a monopoly in favor of the Conference carriers.

7. In finding that the contract rate system results in unreasonable discrimination.

8. In finding that the transfer of the former functions of the United States Shipping Board by Executive Order to the Department of Commerce was legal and effective to confer on the Secretary of Commerce all the regulatory powers of the Shipping Act, as amended.

VI.

Summary of Argument

Point 1. The order of the Secretary of Commerce is unsupported by the evidence.

Point 2. The order is contrary to the evidence and to the purpose of the Shipping Act.

Point 3. The contract rate system is lawful.

(a) The contract rate system is in accord with the rule of the Supreme Court of the United States.

(b) The principle of the contract rate system has been approved by the United States Shipping Board Bureau.

Point 4. The Secretary of Commerce was without authority to issue the order in question.

VII.

Argument

The opinion and findings of fact of the lower court are in substantial accord with the facts appearing above. The court recognized the gravity of the situation which confronts appellants, and which the contract rate system was adopted to alleviate, when it stated (R. 41):

> ". . . we are by no means unmindful of the problems of the American shipowner. That these problems are pressing to the point of emergency, is obvious to those who have watched the steady decline of American shipping since the period of the World War; and that the problem requires special treatment from Congress is, we believe, universally admitted. The increase and maintenance of the American merchant marine is a subject of national concern, indeed of national safety, but *the remedy is political and not judicial.*" (Emphasis supplied.)

While they are appreciative of this sympathetic attitude of the lower court, the appellants contend that, pending such political remedies as may be provided, the contract rate system should be permitted to continue to assist them in solving their problems and those of Gulf intercoastal shippers for the following reasons:

Point 1. The Order of the Secretary of Commerce is Unsupported by the Evidence

The Secretary of Commerce found, and was affirmed by the lower court, that the contract rate practice of the appellants is discriminatory and in violation of that part of Section 16 (39 Stat. 734, U. S. C. Title 46, sec. 815) of the Shipping Act, 1916, which makes it unlawful for any common carrier by water—

> "To make or give any undue or unreasonable preference or advantage to any particular person, locality,

or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Aside from the mere finding of the Secretary there is nothing in the record to show discrimination of any kind whatsoever against shippers, carriers or ports. This fact appears to be recognized by the lower court, but that court proceeded to express the opinion (R. 40) that the "admitted and undisputed facts bring the practice within the condemnation of the statute". Inasmuch as it is impossible to find any *evidence* in the record to show that the practice of the appellants resulted in any undue discrimination, the opinion of the court, as well as the finding of the Secretary, is apparently based upon the *assumption* that the operation of the contract rate system represents a potential violation of the statute.

When the tariffs of the appellants embodying the system of contract rates were placed on file by and with the Shipping Board those tariffs, together with the contract rate system which was a part thereof, had the force and effect of a statute. *Pennsylvania Railroad Co.* v. *International Coal Mining Co.*, 230 U. S. 184, 197, 57 L. ed. 1446, 1451; *Davis* v. *Portland Seed Co.*, 264 U. S. 403, 418, 68 L. ed. 762, 766; and *Louisville & Nashville Railroad Co.* v. *Dickerson*, 191 Fed. 705, 709. It is admitted that the mere fact that the contract system has been long continued and that the machinery for its operation is in tariff form "cannot clothe it with immunity." *Merchants Warehouse Co.* v. *United States*, 283 U. S. 510, 511, 75 L. ed. 1227, 1237. However, it is still necessary that there be *substantial evidence* to show that the practice results in undue or unreasonable preference or advantage. *Chicago, Rock Island & Pacific Railway Co.* v. *U. S.*, 274 U. S. 29, 33, 71 L. ed. 911, 915; *U. S.* v. *Abilene & Southern Railway Co.*, 265 U. S. 274, 288, 68 L. ed. 1016, 1022. As stated by this court in *Interstate Com-*

merce Commission v. *Louisville & Nashville Railroad*, 227 U. S. 88, 91, 57 L. ed. 431, 433:

> ". . . *A finding without evidence is arbitrary and baseless.* And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and *comes under the Constitution's condemnation of all arbitrary exercise of power.*" (Emphasis supplied.)

The finding of the Secretary and of the lower court, being without foundation in fact, is arbitrary and baseless and, therefore, cannot support the order in question.

Point 2. The Order is Contrary to the Evidence and to the Purpose of the Shipping Act

The record not only fails to disclose any undue preference or advantage under the contract rate system, but it affirmatively shows that there results therefrom no undue prejudice or disadvantage, or any discrimination whatsoever, against shippers, carriers or ports.

Any shipper who cared to do so could execute a contract. A non-contract shipper who thought that he was the victim of discrimination because he was being charged a non-contract rate could readily become entitled to the lower rate merely by signing a contract. The removal of the "discrimination" was therefore solely within the control of the shipper. The carrier could not compel him to sign a contract but could only continue to offer him the opportunity to sign; he could do so or not, just as he saw fit. And he could contract as to any number of contractable items he chose. Thereafter he could still ship, without violating his

contract, any items covered thereby either by rail, rail-ocean, rail-barge-ocean, or barge-ocean routes, or by intercoastal water lines operating from the Atlantic. In other words, he merely obligated himself, if he intended to ship any of his contract items through the Gulf, to patronize one of the regular, established services rather than such chance service as might be offered by tramp steamers. Certainly this does not constitute discrimination between shippers.

As far as carriers are concerned, it has already been shown that any carrier regularly engaged in the Gulf intercoastal trade is eligible for membership in the Gulf Intercoastal Conference, the announced purpose of which is "to promote commerce between United States Gulf and Pacific Coast ports" (R. 81). The Conference Agreement has been duly approved by the Bureau under Section 15 of the Shipping Act (U. S. C., Title 46, sec. 814) and all activities thereunder are under the jurisdiction of and subject to review by the Bureau. If the members of the Conference should refuse to admit a carrier for cause found by the Bureau to be insufficient the Bureau could withdraw its approval of the agreement. The continued combined activities of appellants would then be no longer excepted from the provisions of the anti-trust laws as provided in Section 15.*

If a carrier does not choose to join the Conference it can nonetheless engage in transportation by water between Gulf and Pacific Coast ports. Even though there be only a relatively small number of non-contract shippers who ship contractable commodities, yet there are a large number of non-contractable commodities the movement of which would be

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*The fifth paragraph of Section 15 (46 USC § 814) provides that "Every agreement, modification, or cancellation lawful under this section shall be excepted from the provision of the Act approved July second, eighteen hundred and ninety, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' and amendments and acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,' and amendments and acts supplementary thereto."

open to *any* carrier. As a matter of fact, less than 64% of the tonnage carried by the Conference lines moved under contracts. This means that more than one-third of the port-to-port tonnage is open to any carrier, and it must always be remembered that the tonnage moving under joint all-water rates with the barge lines, or under rail-ocean rates with the railroads, or under rail-barge-ocean rates, are never covered by appellants' contracts. Certainly a carrier who prefers *not* to offer a *regular service* cannot be heard to complain because he finds it difficult to participate in *all* of the *regular port-to-port trade.*

Likewise, there has never been any discrimination between ports, nor has there been a case where a port has been eliminated from any benefits accruing from the contract rate system. In fact, according to the testimony of one witness, the contract rate system has been an advantage to the port of Mobile by virtually guaranteeing a flow of traffic through that port and a consequent continuation of the State docks (R. 57).

Further evidence of the *absence* of undue prejudice or disadvantage, or of discrimination of any kind, is found in the record, which shows that, with one minor exception, shippers who furnish tonnage to the appellants favor the contract rate system because it assures them a stable and regular service which makes for a degree of rate stability that protects them on comparatively long-term contracts. These facts are recognized by the lower court (R. 39). Certainly if the system were unreasonably or unduly prejudicial it would hardly have found the almost universal support which the record indicates it enjoys.

The Shipping Act, 1916, was specifically stated to be—

> "An Act to establish a United States Shipping Board for the purpose of *encouraging, developing, and creating* a naval auxiliary and naval reserve and *a merchant marine to meet the requirements of the commerce of the United States* with its Territories and possessions and with foreign countries; to regulate carriers by

water engaged in the foreign and interstate commerce of the United States; and for other purposes." (39 Stat. 728, c. 451. Emphasis supplied.)

The evidence herein shows that the contract rate system has tended to achieve this purpose because it has been conducive to the maintenance of an efficient and regular service between United States Gulf and Pacific Coast ports "to meet the requirements of the commerce of the United States." Without that system, according to the record, and as recognized by the lower court (R. 39), the appellants, the only regular carriers in this service, could not have developed and cannot now maintain the dependable merchant marine which is available today. It may be said, without fear of supported contradiction, that if the basis of the present merchant marine which plys between the Gulf and the Pacific be removed there will return the chaotic conditions which the Gulf Conference *and* the contract rate system were instrumental in remedying. There would thus be defeated the very purpose of the Shipping Act. An order capable of such a result could hardly be deemed lawful, especially when issued by the very agency which presumes to be proceeding in furtherance of that Act.

Point 3. The Contract Rate System is Lawful

(a) THE CONTRACT RATE SYSTEM IS IN ACCORD WITH THE RULE OF THE SUPREME COURT OF THE UNITED STATES.

Under the rule enunciated by this Court a difference in rates cannot be held illegal "unless it is shown that it is not justified by the cost of the respective services, by their values, or *by other transportation conditions.*" *United States* v. *Illinois Central Railway*, 263 U. S. 515, 523, 68 L. ed. 417, 425. This Court also stated:

> "The effort of a carrier *to obtain more business and to retain that which it has secured*, proceeds from the motive of self-interest, which is recognized as legiti-

> mate; and the fact that preferential rates were given only for this purpose relieves the carrier from any charge of favoritism or malice . . . To bring a difference in rates within the prohibition of Sec. 3,* it must be shown that the discrimination practised is unjust when measured by the transportation standard. (Emphasis supplied.)

Section 3 * of the Interstate Commerce Act was also involved in *Interstate Commerce Commission* v. *Baltimore & Ohio Railroad Company*, 145 U. S. 263, 284, 36 L. ed. 699, 706, wherein this Court stated that—

> "... railway companies are only bound to give the same terms to all persons alike under the same conditions and circumstances, and that *any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charges . . .*" (Emphasis supplied.)

It is submitted that there is a presumption that a difference in rates is founded upon a difference in conditions and surrounding circumstances, and that the burden of proving that any undue preference or advantage results is upon the party who alleges it. The record herein shows by a very great preponderance of the evidence that no undue, unreasonable, or objectionable preference or advantage resulted from the operation of the contract rate system. However, the lower court concluded (R. 40) that such a condition existed merely because there were two rates—the contract and the non-contract, without endeavoring to show that the descrimination which is alleged to result from the existence of the two rates is "undue or unreasonable" as required if it is to be condemned under Section 16 of the Shipping Act.

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* Sec. 3 of the Interstate Commerce Act (49 USC § 3) declares unlawful "any undue or unreasonable preference or advantage" or "any undue or unreasonable prejudice or disadvantage." To similar effect is Sec. 16 of the Shipping Act, the first paragraph of which makes it unlawful for any water carrier "to make or give any undue or unreasonable preference or advantage" or to subject any person "to any undue or unreasonable disadvantage."

There was *no attempt made to show that the difference between the contract rates and the non-contract rates is not justified.* On the contrary, it clearly appears that the contract rate, which is the basic rate, is charged *all* shippers who are willing to cooperate with the carriers by giving them all of the contract tonnage destined for the Pacific Coast via the Gulf and thus *assuring them of sufficient traffic to maintain a regular service, minimize waste or unused cargo space, and thus warrant the contract rate.* The Chairman of the Gulf Intercoastal Conference stated (R. 67) that stability of service is influenced by the execution of contracts because the Conference lines are thus "assured to a certain degree an approximate tonnage upon which they can bank their operations."

The non-contract rate, which includes an additional charge of ten cents per hundred pounds, applies only to that class of shippers who refuse to cooperate to maintain a regular and stable service and who prefer to speculate upon the possibility that a tramp steamer may be available with a cut rate when they have a shipment to move. If they lose by their speculation they have only themselves to blame.

The circumstances surrounding the application of the contract and non-contract rates are thus seen to be wholly dissimilar. It was only natural that the appellants should make an effort *to retain the business which they had secured.* That business was secured by the offer of stability of service and of rates in the Gulf intercoastal trade, and the retention of the business was made possible through the continuation of satisfactory service. This was, in turn, dependent upon the assurance provided to the appellants by the contracts with the shippers that adequate tonnage would be available to warrant the maintenance of the service. It is the contention of the appellants that *this change in circumstances over the unsatisfactory situation existing prior to the adoption of the contract rate system warranted the differential accorded to the shippers who made it possible,* and that this is contemplated by the rule enunciated by this Court.

(b) THE PRINCIPLE OF THE CONTRACT RATE SYSTEM HAS BEEN APPROVED BY THE UNITED STATES SHIPPING BOARD BUREAU.

The case of *W. T. Rawleigh Company* v. *Stoomvaart, et al.*, 1 U.S.S.B.B. 285, is almost identical with the case at bar. It involved a contract rate system under a conference agreement approved by the Shipping Board under Section 15 of the Shipping Act. The carriers in question were engaged in transportation between the Netherlands East Indies and the United States. The conference agreement provided, as does the agreement in the instant case, that any carrier regularly engaged in the trade should be admitted to membership upon the consent of a majority of the parties, and that admission should not be denied without just and reasonable cause. There were ten conference members, and there was one non-conference line also engaged in the trade. All eleven lines participated in the contracts.

The contracts were for a period of not more than one year, and both contract and non-contract rates were listed in tariffs, the higher non-contract rates being charged shippers who did not agree with the conference carriers to furnish them all of their shipments during the term of the contract. The contracts provided for shipments only in connection with traffic on which the lower rates were accorded.

Contract forms were offered all shippers in the trade, and all signed with the exception of the W. T. Rawleigh Company. That Company was the only shipper that complained about the system, just as in the instant case the only complaining shipper was one who had failed to sign a contract and was, therefore, required to pay the higher non-contract rate.

The objection to the contract system was that it subjected the complainant to undue and unreasonable prejudice and disadvantage in violation of the Shipping Act by exacting a higher rate from it for the same service which it accorded other shippers. The parties stipulated that no "particular transportation service" was furnished the complainant's

shipments which was not furnished the competing shippers who paid the lower contract rate. The evidence showed that the only disadvantage suffered by the complainant was with respect to the rate. There was no evidence that any other shipper had been preferred over complainant, or that it had been subjected to any unfair treatment in matters of space or other facilities, or that the complainant had been treated differently from any other shipper except as to the "rate disparity factor inherent in any contract rate practice."

The evidence further showed that "the purpose and ultimate effect of the contract rate system in the trade is to enable them to estimate the approximate volume of cargo that will move over their lines and to *insure stability of rates and regularity of service.*" It also appeared that the promise of the shippers to ship all of their tonnage via the contract carriers, together with the estimates which the shippers made of their tonnage requirements, aided the carriers in arranging sailings to fill the requirements of the trade and in a measure to avoid "uneconomical operation of excess ships."

The Board observed that the carriers had "the unqualified support of practically all other shippers than the complainant through the use of the contract rate system in its simple form." The Board then stated (p. 292):

> "The contract rate practice as a practice is not new, . . . It has presently almost universal practical application, . . . it is a system of rate application which finds acknowledged adaptability in ocean transportation.* An important attribute of it is equality of rate treatment as between large and small shippers."

The Board held that the practice of which the Rawleigh Company complained was not in violation of the Shipping Act, and, on July 6, 1933, dismissed the complaint, stating, in part, as follows (p. 293):

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* The appellee has approved, under Section 15, more than 90 agreements for conferences comprised of water carriers in foreign commerce. *The majority of these groups employ some form of contract rate system.*

> "The Shipping Act, . . . does not forbid the contract rate practice as such; *nor has the Board ever considered that the practice as a practice contravenes any of the regulatory provisions of the Shipping statute.* . . . In this connection it is not persuasive that the respondents' practice is unlawful because of the absence of materially different service before and since the inauguration of such practice by them. Manifestly, a *basic reason for the inauguration of the contract rate practice was to secure protection to the carriers of the established services,* maintenance of which required heavy capital and overhead expenditures. These considerations, it would appear, justified adoption by the respondents of every reasonable measure, such as the contract rate practice per se, *to assure the stability of competitive conditions necessary for the continuance of the regularity and frequency of service required by shippers in the trade and which, except for introduction of such practice, might well have become impossible.*" (Emphasis supplied.)

No discussion is necessary to show the almost identical conditions existing in the *Rawleigh* case and that at bar. In both cases: (1) the conference agreements provided the same terms for admitting to the conferences all regular carriers in the trade; (2) the tariffs published both contract and non-contract rates; (3) some items were contractable and some were not, and the contracts, though promising exclusive patronage of participating carriers, obligated the shipper only as to contractable items; (4) contracts were offered to all shippers; (5) only one shipper complained against the system, and he had no contract and was required to pay the higher rate; (6) *the purpose and effect of the contract system was to insure regularity of service and stability of rates;* (7) contract shippers estimated their tonnage requirements as an aid to the carriers; (8) the objection to the system was that it resulted in undue and unreasonable prejudice and disadvantage; and (9) the only disadvantage was with respect to the rate.

The only real difference is that the *Rawleigh* case involved foreign commerce, whereas the appellants herein are en-

gaged only in intercoastal transportation. This is the difference upon which the Bureau relied when it refused to follow its decision in the *Rawleigh* case. It stated (see Exhibit B attached to the answer of appellee):

> "It is notorious that intercoastal transportation is not attended by many of the traffic and transportation circumstances attending transportation in foreign commerce." (R. 32-33.)

However, under the Shipping Act both foreign and intercoastal commerce are subject to the same tests as to lawfulness of rates, charges and practices. Furthermore, the record fails to disclose any facts, or any effort to adduce any facts, which would tend to show that any different considerations should apply to intercoastal commerce. If the Bureau has such facts available, which appellants deny, they should have been made a part of the record herein. As observed by this Court in the case of *Baltimore & Ohio Railroad Co.* v. *United States* (Chicago Junction case), 264 U. S. 258, 263, 68 L. ed. 667, 673:

> ". . . Facts conceivably known to the Commission but not put in evidence will not support an order . . ."

Upon the record, therefore, it must be concluded that the Bureau has taken an entirely inconsistent and arbitrary position in refusing to follow the *Rawleigh* case. Furthermore, the decision in that case is clearly in accord with the principle enunciated by this Court in *United States* v. *Illinois Central Railway* and *Interstate Commerce Commission* v. *Baltimore & Ohio Railroad Company*, both supra.

Point 4. The Secretary of Commerce was without Authority to issue the Order in Question

The Secretary of Commerce was without authority to issue the order here under review because of the fact that Executive Order No. 6166, which abolished the United

States Shipping Board and transferred its functions to the Department of Commerce, was invalid and, therefore, conferred no authority upon the Secretary.

This same question is raised in the case of *Isbrandtsen-Moller Co., Inc.* v. *United States,* which was argued before this Court on January 15, 1937 (No. 307, October Term, 1936). That is also a proceeding to review an order of the Shipping Board, and was decided by a three-judge statutory court in the Southern District of New York, which held that the order of the President was valid and transferred the functions of the Shipping Board to the Department of Commerce, thus making the Secretary of Commerce the ultimate head of the Shipping Board. 14 F. Supp. 407.

By the time the case at bar comes before this Court for consideration, that of the *Isbrandtsen-Moller Company* will no doubt have been decided, and the validity of orders of the Secretary of Commerce in connection with the Shipping Board pursuant to the abolishment of that Board and the transfer of its functions to the Department of Commerce, under Executive Order No. 6166, will have been determined. Therefore, the appellants do not desire to offer any extended argument upon this subject, but they do wish to point out that the Shipping Board acts in a quasi-legislative capacity when it determines what rates or practices shall be applicable in the future, and when it makes investigations for the information of Congress; that it acts as an agent of the legislative department when it makes investigations for the information of the Interstate Commerce Commission; that it acts in a quasi-judicial capacity when it determines whether or not a complaining shipper is entitled to reparation because he contends that unreasonably high or unjustly discriminatory rates have been charged him in the past; and that there is no ground for holding that the Board is an *executive agency,* as required by the Economy Act (U.S.C., Title 5, §§ 125, 126) to make it subject to transfer or abolishment by the President. See *Humphrey's Executor* v. *United States,* 295 U. S. 602, 79 L. ed. 1611.

Therefore, Executive Order No. 6166 was invalid, at least insofar as it purported to affect the Shipping Board, and the functions of the latter could not be thereby abolished and transferred to the Secretary of Commerce. It necessarily follows that the order of the Secretary here in question was issued without authority.

VIII

Conclusion

The foregoing considerations demonstrate that the order of the Secretary of Commerce seeking to abolish appellants' contract rate system should be set aside as prayed in the bill for the following reasons:

(a) The adoption of the contract system was found necessary to secure protection to the carriers of the established service from the Gulf to the Pacific.

(b) The adoption of the contract system was found necessary to assure the stability of competitive conditions essential to the continuance of the regularity and frequency of service required by the shippers in the Gulf intercoastal trade.

(c) Under the contract system more than one-third of the port-to-port traffic from the Gulf to the Pacific, and all of the traffic which moves under joint rates with the railroads or the barge lines, or both, is available to any water carrier.

(d) Any carrier that actually engages * in the Gulf intercoastal service may become a member of the Gulf Intercoastal Conference and participate in the contract system.

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* "There are no carriers operating regularly in the general cargo trade from the Gulf to the Pacific who are not members of the Gulf Intercoastal Conference. Only lines engaged in the Gulf intercoastal trade may become members of the Conference. If a carrier were actually engaged in the service, that is, actually put a ship down there, booked cargo, loaded it, filed his rates with the Shipping Board, and sailed the vessel, he would be qualified to apply for membership in the Conference." (R. 65.)

(e) The shippers in the Gulf intercoastal trade, with a minor exception, heartily endorse the contract rate system and do not want to see it abolished.

(f) No evidence, substantial or otherwise, was adduced by the appellee to show that the contract rate system resulted in "any undue or unreasonable preference or advantage" or in "any undue or unreasonable prejudice or disadvantage" whatsoever.

(g) Even though there were evidence to support the order in question, the Secretary of Commerce had no authority to issue it.

THEREFORE, the decree of the District Court of the United States for the District of Columbia should be reversed.

Respectfully submitted,

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